



Procedural Justice and a Nation of Laws

Admittedly, I don't know nearly as much about the details of this situation as those who are now indignant over how it ended. But it isn't to the Anthony case itself that I wish to speak but, rather, the notions of [justice](#) that it has brought to the surface.

Those who believe that Casey Anthony did indeed murder her daughter view her acquittal as proof that justice, in this case, has not been served. It is hard not to sympathize with this sentiment, for there is nothing easier in the world than to regard [justice in terms of results](#). Yet for as difficult as it may be to refrain from identifying with this conception of justice, it is imperative that we try, for nothing less than our freedom as Americans depends upon it.



Let me be more specific. As *Americans*, co-members of a *procedural* or legal association, the inheritors of a *constitutional* Republic, we have no option but to regard justice primarily in procedural or *formal*, not *substantive*, terms. What this means is that while the Casey Anthony trial didn't terminate in the verdict that we desired, as long as the prosecution and defense teams satisfied all of the legal criteria in place, justice *was* served.

Justice is a virtue, for sure, and in our personal relationships — as spouses and parents, children and friends — substantive understandings of justice may very well be of first importance, for the intimacy that characterizes such relationships renders it possible for us to give our family and friends *what they deserve*. Even this, however, may be stretching matters a bit. In the sorts of informal, intimate relationships with which we are all familiar, justice isn't thought of nearly as much as are such other excellences as fidelity, honesty, love, understanding, compassion, patience, and so forth. Still, when it *is* thought of, it is almost invariably construed substantively: We are concerned with giving those in our lives what they have coming to them.

Formidable indeed is the task of viewing the relationship of citizen-to-citizen *independently* of the kinds of relationships that, constituting the stuff of our daily lives, are most familiar to us. As fellow *citizens*, we are related to one another in terms of *law*, a system of formal conditions or procedural criteria valued on account of its indifference to the substance of the ends we choose to pursue. From the perspective of the citizen, a member of the procedural association we call the American Republic, as long as every citizen subscribes to those procedures that constitute the association, there is justice. Injustice occurs when those procedures or laws are undermined.

When Americans refer to their country as "[a nation of laws, not of men](#)," they affirm this conception of a procedural association that I have described. A "nation of men" would be a fundamentally different kind of association, an association in which some of the members are forever being compelled to serve the ends of others. That is, if "a nation of laws" is a procedural association, "a nation of men" is a



Written by [Jack Kerwick, Ph.D.](#) on July 7, 2011

substantive association. Simply put, in “a nation of men,” *results* are all that count. There are no laws, but only directives, orders, commands, and, in short, *policies* designed to achieve the substantive satisfactions of those who author them.

There is no greater sign that the procedural Republic bequeathed to us by our ancestors is withering away than the fact that the notion of “social justice” has become as prevalent as it has in our time. Throughout our culture’s major institutions — academia, the news media, and even church — plain old justice has been replaced with talk of “[social justice](#).” Yet as everyone, both the proponents of “social justice” as well as its adversaries, knows all too well, this slight change in phraseology is the function of a major change in conception: [The call for “social justice” is nothing more or less than a call for a new distribution of “society’s” material resources](#). This new distribution, of course, can only be affected by way of an activist government, that is, a government that can bring the desired state of affairs to fruition only by substituting policy for law, the content of *its* dreams for procedures whose formality precludes the accommodation of all dreams.

Those on the Right, it must be admitted, are not above conceiving justice substantively in connection with legal matters. Assuming that prosecutors really did fail to supply a reasonably convincing argument that Casey Anthony is a murderer, assuming that they failed to prove this “[beyond a reasonable doubt](#),” the insistence on the part of some on the Right that her acquittal is an injustice may just be the most recent instance of this impulse to view justice along the lines of outcomes.

But as I have been at pains here to show, this is an impulse that all lovers of American liberty should resist with every fiber of their being, for if this substantive conception of justice prevails, our liberty and the real, procedural justice that makes it possible promise to go the way of the dinosaur.



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